No. 15850

In the United States Court of Appeals for the Ninth Circuit

COLE INVESTMENT CO., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal From The United States District Court For The Southern District of California, Northern Division

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles, California.

RICHARD J. DAUBER,
Assistant United States Attorney,
Los Angeles, California.

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys, Department of Justice,
Washington 25, D. C.

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CITATIONS

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OPINION BELOW

The district court did not write an opinion. Its judgment was based upon the verdict by a jury awarding compensation for the tract of land on appeal. Findings of fact, conclusions of law and judgment by the district court appear in the record at pages 16-22.

JURISDICTION

This is an appeal from a judgment entered by the district court on November 18, 1957 (R. 20-22). The jurisdiction of the district court was invoked by the United States under the Act of August 1, 1888, 25

Stat. 357, 40 U.S.C. sec. 257, and other statutes authorizing condemnation to acquire lands for the purpose here involved and appropriating funds therefor (R. 4). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether severance damages were properly excluded in the circumstances of this case.

STATEMENT

The single tract involved in this appeal (Tract K-1528), owned by the appellant, was acquired by the United States in connection with the Edwards Air Force Base, California. A declaration of taking was filed and estimated just compensation for the tract was deposited in the amount of $8,750.00 (R. 19). Trial to determine just compensation for the taking of this tract, along with many others, was held before a jury in September 1957. Its verdict for this tract was in the amount of $15,000.00 (R. 18). Judgment on that amount, based upon the jury's verdict, was entered on November 18, 1957, and the appellant has appealed from that judgment.

The appeal raises the single question as to whether the district court properly excluded evidence of severance damages. It is believed that the facts in connection with that ruling may fairly be summarized as follows:

The 100 acres of desert land here involved (K-1528) is a tract of land bounded on the west by Lone Butte Road (R. 27). According to counsel for the

appellant, Lone Butte Road, at the time of the taking "consisted of a 20-foot trail or easement which traversed from the south end of the property on up a mile or two to the north" (R. 29). Across Lone Butte Road to the west, so that its east boundary is Lone Butte Road, is another 20 acres of land also owned by the appellant. This 20-acre parcel is referred to in the record as the "Bandy headquarters" (R. 31).[1] Both Mrs. Bandy and Mr. Congdon, the two valuation witnesses for the appellant, testified that "the highest and best use of the 100 acres was for desert home sites" (R. 33).

To the time of the taking, the 100 acres to the east of Lone Butte Road, which was taken, and the 20 acres to the west of Lone Butte Road, which was not taken, had not been used as a unit. However, the offer of proof is, *inter alia*, that (R. 27):

> In about 1948, their plan was to develop and farm the 100 acres across the road, and in connection with that they drilled a deep well, which I understand is 500 feet deep, and proved to be of sufficient size to furnish water to the 100 acres to the east along Lone Butte Road. They purchased and installed a pump, and the necessary bowls and motor and everything in connection with it.

Appellant also offered to prove that the Bandys had acquired the pipe to carry the water to the condemned property (R. 28). Counsel for the appellant went on to state that the farming project had been

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[1] The Cole Investment Company is a family-owned corporation of which Mrs. Ruth K. Bandy is president.

abandoned when the Bandys' tenant learned of the possibility of the taking of the 100 acres (R. 28). Because of their materiality, questions asked by the District Court and the answers thereto are set out verbatim below (R. 31-33):

* * * *

THE COURT: Well, Mr. Seay [counsel for the appellant], first, with respect to the 20 acres, known as the Bandy headquarters, located on the east (*sic*) side of the Lone Butte Road, is there any claim that the fair market value of that 20 acres has been affected or suffered by the taking of the 100 acres?

MR. SEAY: No.

* * * * [2]

THE COURT: Now, at any time did the plan of a unitized operation of the 100 acres and the 20 acres get beyond the stage of planning? Did it ever get beyond the stage of planning?

MR. SEAY: I would say this in this way, your Honor: Experimental crops were planted on the 20 acres, a very small amount of some six or eight or ten crops, to determine—well, in other words, they were experimenting to see what would grow and what the possibilities were. They did determine that, and then, as I say, they had a tenant who was going across the road, and he leveled out and cleaned it out and got in it preparation—there was no leveling to do, but he got it ready.

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[2] The portion omitted at this point clarifies that the personal property for which the appellant is seeking severance damages was all located on the 20-acre parcel known as the Bandy headquarters (R. 31-32).

THE COURT: But water was never conveyed across the road from the reservoir or pumped to the 80 acres? [3]

MR. SEAY: To my knowledge it wasn't conveyed over there for the purpose of growing any crops. There might have been some test runs to see the contours of the land and level in the preparation for eventual distribution of water.

THE COURT: I see. Now, it is my understanding of the testimony of Mrs. Bandy, and also Mr. Congdon, that the highest and best use of the 100 acres was for desert home sites.

MR. SEAY: That is right.

* * * *

The record also discloses that some of the personal property involved in appellant's claim for severance damages had been disposed of prior to the trial (R. 29, 32). The record further shows that the Federal Government deeded to the county a 30-foot strip of land which, when added to a 30-foot strip deeded to the county by the Bandys, enabled the county to construct a 60-foot road out of Lone Butte Road (R. 30, 33-34). Counsel for the appellant acknowledged that the creation of the 60-foot road increased the value of the land constituting the Bandy headquarters, i.e., the land not taken for which severance damages are sought (R. 31).

To the offer of proof by the appellant, which consisted of the statement made by counsel for the appellant summarized above (R. 35), the District Court stated, *inter alia* (R. 35):

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[3] This reference is to the south 80 acres of the 100-acre tract (See R. 28).

> Well, it is my view, Mr. Seay, under the contentions as presented, and my view of the law, federal law dealing with severance that there is no severance damage in this case for which the owners are entitled to compensation. And I would rule, if the witnesses testified along the lines you suggested, that their testimony couldn't properly go before the jury.
>
> * * * *

This appeal followed.

SUMMARY OF ARGUMENT

Even if the 100 acres taken and the 20-acre "Bandy headquarters" had constituted one tract as contended by the appellant, the essential element for severance damages to be awarded, i.e., a lessened value of the part remaining, is not only not alleged but was, in fact, expressly denied to be present here (R. 31). Thus, without more, evidence of severance damages was properly excluded.

But there are several other reasons justifying the result here reached by the District Court. (1) The 20-acre parcel and the 100 acres taken were not in such a relationship to justify application of the severance damage principle, which requires, among other things, a unity of use. Here at best there was only a planned unity of use—and this was out of harmony with appellant's own concept of the highest and best use of the property and so may never have been realized even absent the taking. (2) The value of the appellant's 20-acre parcel was admittedly *increased* rather than diminished as a result of the Government's actions in this case. Also, in awarding

nearly double the estimated just compensation for the 100 acres, it appears that the jury may well have taken into consideration the matters here raised by the appellant though not in the form of severance damages as such. (3) Severance damages, as other damages, must not be based upon speculation. It is clear that testimony in this respect must not be "vague and speculative in character" and that testimony dealing with "possibilities more or less remote" is not properly to be considered. *Sharpe* v. *United States*, 112 Fed. 893, 897 (C.A. 3, 1902), affirmed 191 U.S. 341. Under the offer of proof in this case, any award of severance damages would, of necessity, have had to be speculative and based upon "possibilities more or less remote" (*ibid.*) (4) There could be no recovery for the strictly personal property items in any event. Accordingly, the denial of severance damages in the circumstances of this case was proper and the judgment of the District Court should not be disturbed.

ARGUMENT

Under Well Established Principles Relating to So-Called "Severance Damages", The District Court Was Correct in its Ruling in This Case.

This is an appeal from a ruling by the District Court that the appellant was not entitled to severance damages under the particular facts of this case. The ruling by the District Court was eminently correct for several reasons as will now briefly be shown.

A. *Severance damages are based upon an impairment in the market value of the remaining portion of a single tract:*—Severance damages are to be paid

when the taking of a portion of a tract of land has diminished the value of the part remaining. In such a case, just compensation for the taking includes the lessened value of the residue. E.g., *Bauman* v. *Ross*, 167 U.S. 548, 574 (1897); *United States* v. *Grizzard*, 219 U.S. 180, 183 (1911). In the instant case, however, the appellant, by its counsel, expressly denied that the fair market value of the 20 acres not taken, which it asserts was part of a single tract with the 100 acres taken, had been affected or suffered by the taking of the 100 acres. Such denial could hardly have been in more explicit terms, as disclosed by the record and appellant's own brief as follows (R. 31; Br. 7):

> The Court: Well, Mr. Seay, first, with respect to the 20 acres, known as the Bandy headquarters, located on the east (*sic*) side of the Lone Butte Road, is there any claim that the fair market value of that 20 acres has been affected or suffered by the taking of the 100 acres?
>
> Mr. Seay: No.

Thus the very basis of a claim for severance damages, i.e., an impairment in the value of the remaining part is not only not alleged here but has, indeed, been expressly denied. So, accepting, *arguendo*, that the 20 acres was part of a single tract, with the fair market value of that 20 acres not having been affected, severance damages were properly not included in the award for the acreage taken. It is that simple. As succinctly put by the Court of Appeals in *Baetjer* v. *United States*, 143 F.2d 391, 396 (C.A. 1, 1944),

cert. den. 323 U.S. 772, "So, given a single tract under the test of unitary use and a taking of part of it, there may or may not be severance damages *depending upon whether the taking of the part operates to reduce the market value of what remains.*" [4] Similarly, this Court expressed the principle even more succinctly by noting that "strict proof of the loss of market value to the remaining parcel is obligatory." *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172, 179 (C.A. 9, 1950), cert. den. 340 U.S. 820. With the taking admittedly not having reduced the market value of what remains in the instant case, there was no severance damage. *Ibid.*

B. *Under the facts, severance damages were properly excluded in this case:*—It is well settled that damages may not be awarded for injury to remaining land which, even though in the same ownership, is a different tract from the land condemned. *Sharp* v. *United States*, 191 U.S. 341, 353-355 (1903); *United States* v. *Crary*, 2 F.Supp. 870 (W.D. Va. 1932); *United States* v. *Inlots*, 26 Fed. Cas. No. 15,441a (S.D. Ohio 1873), affirmed *sub nom. Kohl* v. *United States*, 91 U.S. 367 (1875); *Kennebec Water Dist.* v. *Waterville*, 97 Me. 185, 54 Atl. 6 (1902); *St. Louis, M. & S. R. Co.* v. *Aubuchon*, 199 Mo. 352, 97 S.W. 867 (1906). While the question may be left to the jury with appropriate instructions, ruling as a matter of law that the parcels are or are not united is within the province of the court. *Oakland* v. *Pacific Coast*

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[4] Emphasis added throughout this brief unless otherwise noted.

Lumber etc. Co., 171 Cal. 392, 397-398, 153 Pac. 705, 707 (1915). In view of the appellant's reliance upon Sec. 1248 of the California Code of Civil Procedure (Br. 9-11), the following language from the last cited case is appropriate here (171 Cal. at pp. 397-398; 153 Pac. at p. 707):

> Complaint is made that the court by its rulings itself determined whether or not these pieces of property constituted one parcel within the meaning of section 1248 of the Code of Civil Procedure, and refused to allow this question to be submitted to the jury for determination. If appellant is right in his position that this was error, this consideration need not proceed further. But neither the state nor any of its mandatories, nor any other person or corporation, exercising the power of eminent domain, is compelled to submit to the determination of a jury every question of fact. (*Vallejo & N. R. Co.* v. *Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238]), and this question of fact (namely, whether or not, the probative facts being without controversy, the resultant fact establishes the existence of a parcel from which a portion is to be taken) is essentially a question of law for the determination of the court. It is only the "compensation," the "award" which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury. (Const., art. I, sec. 14.) Therefore the court, in itself ruling and in not submitting to its jury the question whether the property taken constituted a part of the larger "parcel" com-

prising the mill property, adopted the proper procedure. * * *[5]

In any event, from the facts disclosed by the record, it becomes apparent that the requisite unity of use for the so-called severance damages rule to apply was not present here. E.g., *Baetjer* v. *United States*, 143 F.2d 391 (C.A. 1, 1944), cert. den. 323 U.S. 772; *Sharpe* v. *United States*, 112 Fed. 893, 896 (C.A. 3, 1902), affirmed 191 U.S. 341. Thus, the 20-acre tract, known at the trial as "the Bandy headquarters" (R. 31), was located on the west side of Lone Butte Road (Br. 7). As to the 100 acres condemned as Tract K-1528, which were located on the other side of Lone Butte Road (R. 27), counsel for the appellant spoke of a plan for the unitized operation of the 100 acres and the 20 acres; but it is clear from the answer to an express question by the Court that the proposal for a unitized use never really got "beyond the stage of planning" (R. 32; Br. 8).[6] Indeed, appellant's counsel acknowledged at the trial that Mrs. Ruth K. Bandy,

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[5] It should be noted that even before the passage of Rule 71A(h), F.R.Civ.P., this Federal eminent domain proceeding to determine the substantive question of just compensation to be awarded would have been governed by Federal rather than local law. E.g., *United States* v. *Miller*, 317 U.S. 369, 379-380 (1943); *United States* v. *Montana*, 134 F.2d 194, 197 (C.A. 9, 1943), cert. den. 319 U.S. 772; *United States* v. *Meyer*, 113 F.2d 387, 394 (C.A. 7, 1940), cert. den. 311 U.S. 706.

[6] It should be noted that rather than accepting an express invitation to make an offer of proof, counsel for the appellant simply let his own admittedly "broad" remarks while presenting his contentions to the trial court, stand as the appellant's offer of proof (R. 35).

president of the family-owned appellant corporation, and Mr. Walter B. Congdon, appellant's appraiser, the two witnesses giving valuation testimony for the appellant, both testified to a *different* highest and best use for the 100 acres than that on which the appellant bases its claim for severance damages. Thus, counsel for the appellant had himself explained that the proposed unitized use was "to develop and farm the 100 acres across the road" (R. 27). But Mrs. Bandy and Mr. Congdon both testified that the "highest and best use of the 100 acres was for desert home sites" (R. 33).

The correctness of the trial court's result can be shown in another way. The preferred, if not the only correct way, to determine compensation is to estimate the value of the total single tract before the taking and subtract therefrom the value of what remains in the owner after the taking. The difference is compensation including both value of land taken and any diminution in value of remainder. *United States* v. *Grizzard,* 219 U.S. 180, 185-186 (1911); *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172, 175 (C.A. 9, 1950), cert. den. 340 U.S. 820. But since appellant claims different highest and best uses for the 100 acres and the 20 acres, that process of valuation is impossible, unified use being a *sine qua non.* This itself disproves the existence of true severance damages.

Particularly appropriate here is the following language by the United States Court of Appeals for the Third Circuit in *Sharpe* v. *United States,* 112 Fed. 893 at page 896 (which language was approved by the Supreme Court, 191 U.S. 341, 354):

It is not denied that in rendering the "just compensation" secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is to be had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between the residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. *How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court.* All the testimony in this case tends to show the separateness of this tract which was the subject of the condemnation proceedings. It had never been farmed or used in connection with either of the other farms owned by the plaintiff in error. It was in no way reasonably or substantially necessary to the enjoyment of the other two tracts. * * *.

In the instant case, as in the cited one, the tract subject to the condemnation proceeding had never actually been farmed or used in connection with the other acreage owned by the appellant. In the above-cited case the Court of Appeals goes on to point out that the tracts were separated by a public road (112 Fed. at p. 896) a fact of which the Supreme Court also took note (191 U.S. at p. 353).[7] Here, as in the *Sharpe* case, the practical application of the rule "must largely depend upon the facts of the particular case" (which, of course, are primarily for the District Court to determine) and "the sound discretion of the court", meaning the trial court.[8]

C. *The appellant has been treated well in the instant case:*—Aside from the purely legal reasons why the ruling attacked is correct, it should be noted that from an equitable standpoint the appellant has fared well at the hands of the Government. As the record makes clear, the Government conveyed a 30-foot strip

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[7] In the *Sharpe* case the Court of Appeals concluded that "the other two farms or tracts of land owned by the plaintiff in error constituted such separate and independent parcels as regards the lands in question that they cannot properly be spoken of as the residue of a tract of land from which the land in question was taken." (112 Fed. at p. 897). As noted by the Court of Appeals (*ibid.*), in the factual situation there presented to it, the trial court did allow the plaintiff in error to show what damage, if any, had resulted from separating the farms but refused to allow the plaintiff in error to show other claimed damage or inconvenience from the taking of the tract for military purposes.

[8] The Supreme Court also took occasion to point out that "what particular items of damage were proper to be considered in relation to the remaining tracts were questions primarily for the trial judge * * *" (191 U.S. at p. 351).

of land to the county "in order that access might be retained to the Bandy Ranch" (R. 34). Indeed, while previous access had been by means of a 20-foot trail (R. 29), the conveyance of the 30-foot strip made possible the construction of a 60-foot road to the appellant's remaining property (R. 34). As counsel for the appellant felt compelled to acknowledge, the effect of the creation of the 60-foot road was to increase the valuation of appellant's remaining property (R. 31). Cf. *Bauman* v. *Ross*, 167 U.S. 548, 574-575 (1897).[9]

It is perhaps worthy of note that the jury's verdict for tract K-1528 was $15,000.00 as compared to appraisals by witnesses for the Government in the amount of $10,000.00 and $10,500.00 respectively. It may well be that the pumps, pipe, well, etc. which the appellant urges here as the basis for a severance damage claim, were taken into account by the jury in making its award, though not in the form of severance damages as such.

D. *"Severance damages", as other damages, must not be based upon speculation:*—Since the remarks constituting the offer of proof in the instant case show that the testimony would be as to matters which never got "beyond the stage of planning", and which would, in fact, be in conflict with the adduced testimony on behalf of the appellee as to the highest and best use (R. 32-33), the proffered testimony would in any

[9] The federal rule is that special benefits to land not taken should be deducted from the award for land taken as well as for severance damages. E.g., *Bauman* v. *Ross*, 167 U.S. 548, 574, 581-582 (1897); *United States* v. *Grizzard*, 219 U.S. 180, 184-185 (1911); *Aaronson* v. *United States*, 79 F.2d 139, 140 (C.A. D.C. 1935), citing numerous authorities.

event have been violative of the rule that testimony in this respect must not be "vague and speculative in character". *Sharpe* v. *United States*, 112 F.2d 893, 897 (C.A. 3, 1902), affirmed 191 U.S. 341. As there made clear, testimony dealing with "possibilities more or less remote" are not properly to be considered (*ibid.*).

E. *There could be no recovery as to part of the property for which the appellant claims severance damages for another reason:*—The appellant here seeks severance damages alleged to have been caused, in part, to strictly personal property, e.g., pipe which had not been placed in the ground or affixed to real property so as to become even a fixture. Thus it appears that part of the pipe, and perhaps some of the other items, just laid on the uncondemned 20-acre tract for some time and then disposition was made of such material following the abandonment of the project for which it was intended (R. 28-29, 31-32). The appellant seeks the difference between the appraised value and the disposal price (R. 28-29; Br. 3, 6-7). But as shown *supra*, pp. 7-9, the impairment of market value, if any, of the residue of the land taken would be the measure of any possible recovery and the appellant has conceded that no such impairment had occurred (R. 31). It should be noted that appellant's counsel expressly referred to the pipe as being "personal property" (R. 31); and appellant's own authority (Br. 11-12) makes clear that "damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid". 2 Lewis on Eminent Domain (3d ed.), Sec. 728, p. 1277.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles, California.

RICHARD J. DAUBER,
Assistant United States Attorney,
Los Angeles, California.

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys, Department of Justice,
Washington 25, D. C.

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